

# **Paternity Establishment Handbook**



*Child Support Enforcement Division*

*July 2004*



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*This booklet is designed primarily for the man named as the "Alleged Father" in a Child Support Enforcement Division paternity case. Others, including attorneys, may also find it useful.*

***CHILD SUPPORT ENFORCEMENT DIVISION***

3075 N. Montana Avenue, Suite 112

P.O. Box 202943

Helena, MT 59620-2943

Telephone: 1-800-346-KIDS (5437)

(406) 444-9855 (Helena and out of state)

<http://www.dphhs.state.mt.us>

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***Susan Gecho Gobbs,***

Montana Legal Services Association, Helena

***Marsha Goetting PhD,***

Department of Agricultural Economics and Economics, Montana State University, Bozeman

***Honorable Joe Hegel,***

Montana Sixteenth Judicial District, Forsyth

***Honorable Thomas Olson,***

Montana Eighteenth Judicial District, Bozeman

***David Patterson,***

School of Law, University of Montana, Missoula

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# ***PATERNITY ESTABLISHMENT HANDBOOK***

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## ***INTRODUCTION***

The Child Support Enforcement Division (CSED) uses administrative law proceedings to establish paternity for children. While these proceedings are informal, there are steps, rules and procedures that must be followed. Unfamiliarity with these rules can cause confusion and delay. Consequently, CSED developed this booklet to guide alleged fathers through a typical administrative paternity case.

Usually the paternity case begins when an unmarried mother of a child seeks CSED paternity services. Other cases may be started by men who want to be declared fathers. Still other cases may involve a legally presumed father and another man who is alleged to be the biological father. Cases brought by men make up only a small minority of CSED paternity cases. This booklet discusses the more typical case.

Recurrent abbreviations used in this booklet are:

- “***ALJ***” means one of the Administrative Law Judges who conducts administrative hearings, considers the evidence and applicable law and renders legal opinions and orders in contested CSED cases.
- “***CSED***” means the Child Support Enforcement Division, an agency within the Montana Department of Public Health and Human Services.
- “***OALJ***” means CSED’s Office of the Administrative Law Judge. This office provides clerical support and technical assistance to the ALJ, schedules hearings, assigns contested cases to an ALJ for hearing, and maintains hearing files and records.

This booklet does not include all laws and rules regarding paternity cases. Nor is this booklet intended to give legal advice. It is for general information only. ***If you have specific legal questions, you are encouraged to consult with an attorney of your choice. If you want an attorney but don’t know who to call, dial the State Bar of Montana’s Lawyer Referral Service at 1-406-449-6577.***

If you have questions concerning this booklet or any other child support matter, you may call CSED at the numbers listed on the front page of this booklet.

## ***CONTESTED CASE PROCESSING***

***Section 1. Administrative Paternity Case Overview.*** The objective of CSED’s administrative paternity process is to answer the question: Who is the biological father of this child?

The purpose of the process is to get you, the man claimed to be the child’s biological father, to submit to genetic testing. CSED will begin by giving you official notice of the claim. If you disagree, CSED will set the matter for hearing. At this hearing, the mother

will tell why she believes you could be the biological father. You will then have an opportunity to tell your side of the story.

CSED can force you to submit to testing if facts produced during the hearing prove a strong reason to believe that you “could” be the biological father. CSED does not need to find that you are in fact the biological father.

If you are not the biological father, testing will accurately prove it. If you are the biological father, test results will, with a high degree of certainty, confirm it. If the percentage is high enough--95 percent or greater--the law will automatically consider you to be the child’s legal father.

**Section 2. *Prior Court Decrees are Binding.*** If an existing decree or court order declares another man to be a child’s legal father, CSED will not open a paternity case against you, even when there is evidence that you may, in fact, be the biological father. Likewise, if a decree or order declares you to be the child’s father, CSED will not determine paternity even if there is a serious question whether you are the biological father. CSED cannot disregard a decree or court order.

Consider this example. A married couple are divorced. The divorce decree states “there is one child of the marriage of mother and husband.” This simple language creates a judgment establishing the former husband as the child’s father<sup>1</sup>. Years later, the mother tells her former husband that another man is the child’s biological father. The former husband decides he does not want to pay support for another man’s child. Genetic testing later proves that he cannot possibly be the biological father. CSED must continue to treat the former husband as the legal father. CSED is bound by the findings in the decree.

(NOTE: In some but not all cases, a decree or order establishing paternity can be contested. This contest can only take place in the court that issued the decree. CSED cannot do this. If the contest is successful, the decree may be set aside and, if so, the court can reconsider the paternity issue. If there is a decree or order in your case and if you think you are not the father, **consult with an attorney** to see if the matter can be contested.)

**Section 3. *The First Step in a Contested Paternity Case.*** CSED paternity cases begin with a “Notice of Parental Responsibility.” When you receive this notice, read it carefully. It contains information that you should know. The notice also tells you what you need to do to protect your right to a hearing should you want one. If you do not follow the directions in the notice you may be declared the legal father by default.

In many cases, the packet of materials containing the Notice of Parental Responsibility will also include a second notice. This second notice is called a “Notice and Order Concerning Support.” The purpose of the second notice is to allow CSED to set child support immediately after paternity is proven.

Look for a second notice in your case. Carefully examine all the materials you received from CSED. If you find a second notice, read it carefully and follow the directions that come with that notice. The second notice affords another, separate

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<sup>1</sup>See e.g., *In re Marriage of Holland*, 224 Mont. 414, 730 P.2d 410 (1986)

hearing right independent of the first notice. Failure to abide by the directions in the second notice can lead to a default child support order. Following the directions for the first (paternity) notice will not excuse a default with regard to the second (support order) notice.

If you have general questions concerning the paternity notice or the second, support order notice, or have questions about other aspects of your case, you may contact the CSED caseworker assigned to your case (see section 40). Remember, while the caseworker can help you understand the process, the caseworker cannot give you legal advice. ***If you need legal advice, consult an attorney.***

***Section 4. Your Options After Notice.*** After you receive a Notice of Parental Responsibility there are several options for you to consider. If you agree with the notice, one option is to do nothing. If you do nothing, the law will establish you as the child's legal father by reason of your default.

Another option is for you to voluntarily accept legal responsibility for the child by signing the "Admission of Paternity" form. This form is included in the packet of materials you received with the notice. If you sign this form and file it with CSED, you will become the legal father of the child.

Another option would permit you to try to settle this matter with the CSED caseworker. If you can convince the caseworker that you cannot possibly be the biological father, your case will be closed.

If you think you could be the biological father but you are not sure, another option would be to voluntarily take the test. Volunteering for this test might satisfy your doubts. It can also have positive benefits. You avoid the need to participate in the administrative hearing. You save the time, cost, expense and anxiety associated with all legal proceedings. If the test results show you are not the father, CSED will close your case and you will not again be bothered by CSED with regard to this child. If the test results show you are the father, you can take steps to establish a father-child relationship and to use your parental rights including visitation and custody.

Even if you are positive that you are not the father, you may want to voluntarily take the test anyway. If you are not the father, testing will prove this fact. You will receive a copy of the test results proving you are not the father. You will also have an "Order of Nonpaternity" signed by CSED. This is a legal finding and judgment declaring that you are not the child's father.

Having these documents in your records may prove valuable to you at some future date. It will discourage the child's mother from initiating any other legal action against you in court. Because you have the order, you can request that the court dismiss the case. Further, if your name is on the child's birth certificate as the father, you can use the Order of Nonpaternity to remove your name from the certificate.

To pursue settlement or to arrange for voluntary testing, contact the CSED caseworker whose name appears at the bottom of the Notice of Parental Responsibility.

On the other hand, if you disagree with the notice and cannot, or do not want to, settle or volunteer for testing, you should request an administrative hearing. At the hearing you will be able to challenge CSED's proposed action.

**Section 5. To Request an Administrative Hearing.** The Notice of Parental Responsibility gives you the opportunity for an administrative hearing. At this hearing you can challenge the mother's attempt to establish you as the child's biological and legal father.

Look for the hearing request form that is included in the packet of materials you received. Fill out this form completely, to the best of your knowledge. Mail, fax or deliver the completed hearing request form to the OALJ at the address shown on the form. If you fax your request, you must immediately mail the original to the OALJ (see section 41 for the fax number).

An important reminder! To get an administrative hearing, you must file your request for hearing **within 20 days** from the day you received the notice. Be sure the request for hearing form is actually received by the OALJ **within the 20-day period**. If you mail, fax or deliver the form late, the CSED can enter a default against you. Even if you mail the form **within the 20-day period**, if it is not received by the OALJ before the end of the 20th day, the CSED can still enter your default. Late or not, send in the request form as soon as possible. If your late request is received before your default is entered, you may still have a hearing.

**The 20-day period for requesting a hearing starts running on the day you received the notice.** For example, if the sheriff or some other process server handed the notice to you, mark the day this happened. If you received the notice by registered or certified mail, mark the day you or another person on your behalf signed the green registered mail receipt. Starting with the first day after the day you received the notice, count 20 days. The 20th day is your deadline.

Within the 20-day period you must take some action concerning the notice. During this time you might attempt to settle the matter, volunteer for testing or request a hearing. **Remember, negotiations and attempts to settle do not extend the time for requesting a hearing.** If you consult an attorney concerning the notice, the 20-day period is not extended. **You or your attorney must either resolve the matter or request a hearing within the 20-day period.** If you do nothing, at the end of the 20-day period CSED can declare you to be the child's legal father by default. If a default is entered, CSED will send you a copy of the order. For additional information regarding default orders, refer to section 37.

**Section 6. Provide Additional Details with the Request for Hearing.** When you request a hearing or soon thereafter, let CSED know if:

- you are unable to use a telephone due to deafness or other disability.
- you do not speak English fluently.
- you do not write or read well.
- you have a disability which will make it difficult for you to effectively participate in the administrative hearing.



CSED will make special arrangements for you so that you will be able to participate effectively in the hearing.

**Section 7. After Filing a Request for Hearing.** After you file a timely request for hearing, CSED will mail a “Notice and Order for Hearing” to you. You should receive this order in about a week after the OALJ receives your request for hearing. Read this order carefully. It will tell you the date and time for your hearing. It will tell you when your “Witness and Exhibit List” must be filed (see section 26). It will also tell you when and how you must request discovery (see section 25). The order also contains information about participating in telephone hearings (see section 20.)

If there is something in the hearing order that is not clear to you, you may call one of the assistants in the OALJ for clarification. You may also call the CSED caseworker assigned to your case. Do not call the ALJ personally. The ALJ is prohibited by law, policy and ethical considerations from discussing the case with you.

**Section 8. To Withdraw a Hearing Request.** If you decide you do not want a hearing after it has been scheduled, you may withdraw your request for hearing. Your request to withdraw must be in writing and filed with the OALJ no later than the day before a scheduled hearing.

**Section 9. Rescheduling a Hearing.** CSED is required to schedule and hold administrative hearings within strict time limits. For this reason, as a general rule, a scheduled hearing will not be rescheduled or delayed. However, if you cannot be present at the date and time set for the hearing because of other urgent matters, you may request that it be continued to another day and time. You must convince the ALJ that your matter should have priority over the scheduled hearing.

A request to continue a hearing to another date or time must be in writing and filed with the OALJ at least one day prior to the scheduled hearing. Your request must include **all** of the following information:

- The reason you are requesting that the time or date be changed
- Why you believe your reason should have priority over the scheduled hearing
- Why it would be unfair if the time or date of the hearing were not changed
- A statement that you contacted the caseworker concerning your request; also, the caseworker’s reaction to the continuance.

If your request fails to include any of the above requirements, or if the ALJ does not consider your reasons for the continuance to be sufficiently urgent, the ALJ may deny your request. If your reasons are of an urgent nature and if there are no objections to the continuance, the ALJ may grant your request. If there are objections, the ALJ may contact you and the objecting person to consider your oral arguments before deciding whether to grant your request.

**Warning!** If the ALJ does not notify you that a scheduled hearing is continued to another date and time, you must attend the hearing as originally scheduled. If you do not attend, the case may be decided against you by default. If your request is granted, you will receive a notice informing you of the new date and time.

**Section 10. Representation by and Appearance of Legal Counsel.** In all CSED cases, CSED and CSED attorneys do not represent the interests of any individual person. CSED's only interest is to see that children will be supported by their biological and legal parents.

All CSED administrative proceedings and administrative hearings are designed to allow persons to represent themselves. Many do so effectively. Representation by legal counsel is not required, but ***all persons are entitled, at their expense, to the services of an attorney of their choice.*** If you do obtain legal counsel, have the attorney file with CSED a "notice of appearance." CSED will conduct all further business in this case through the attorney.

Only an attorney licensed to practice law in the State of Montana can represent you in a "contested case." A contested case begins after a person is served with an administrative notice such as the Notice of Parental Responsibility. In all CSED proceedings including contested cases, you may be accompanied by a non-attorney who can assist you in representing yourself. However, such a person will not be allowed to speak for you.

## **KEY ELEMENTS OF A PATERNITY CASE**

**Section 11. Reasonable Cause to Believe.** Contested paternity hearings are limited to one key issue: is there reasonable cause to believe that you ***could*** be the child's biological father?

"Reasonable cause" is not conclusive proof that you are the biological father. It means there is a reasonable suspicion, based on the facts, that you and the child's mother engaged in a sexual act at about the time the child was conceived.

When reasonable cause is found to exist, the ALJ can order you to submit to genetic testing. The ALJ can order you to submit to genetic testing even though there is also reasonable cause to believe some other man could be the child's father.

Because the hearing is limited to the single issue of whether or not you could be the biological father, other men's cases will not be considered at your hearing. If another man is the biological father, genetic testing, ordered in your case, will exclude you. If you are excluded, CSED will close your case.

**Section 12. Proof of Reasonable Cause.** To prove reasonable cause, CSED should first set the approximate time the child was conceived. In normal births, conception will occur sometime between 266 days and 294 days before the child's birth.

Next, CSED must determine whether, during the likely time of conception, you engaged in a sexual act with the child's mother that could have resulted in the child's birth. This is normally established by the testimony of the mother. When her testimony is different from yours, CSED will look at circumstantial evidence to see which of you is more believable; some examples of circumstantial evidence are:

- Whether you and the mother dated each other or lived together during the time of conception.
- Whether you or the mother made statements to friends, relatives and acquaintances suggesting there was a sexual relationship between you and the mother during the time of conception.
- Whether you made oral statements to friends, relatives and others admitting to be the child's father.
- Whether you acted like you were the father (visiting the child after the child's birth, buying gifts for the child, and so forth).
- Whether there is a physical resemblance between you and the child.
- Whether there is other evidence that would lead a reasonable person to conclude that sexual contact occurred between you and the child's mother.

**Section 13. Genetic Testing Consequences.** If test results conclusively show that you could not be the child's biological father, CSED will close your case. CSED will then proceed to identify other possible fathers for the child.

If testing shows a 95 percent or higher statistical probability of paternity, the law will presume you to be the biological father and the child's legal father. If you are the presumed father, you will have all the rights and responsibilities of fatherhood, just as if you were married to the mother when the child was born.

The presumption of fatherhood created by this process is not absolute. If you disagree with the results, you may go to court and have paternity finally determined by a district court judge (see section 39).

**Section 14. Common Defenses.** As indicated in section 12, CSED must show through testimony and other evidence that there is reasonable cause to believe that you could be the child's biological father. After CSED has presented its case, the burden shifts to you to show any defenses you may have. The following are examples of common defenses:

**(a) Time of conception.** To establish reasonable cause there must be a likelihood that a sexual act occurred during the probable time the child was conceived. In normal births, the probable time of conception is between 266 and 294 days before the child's birth. However, if the child is premature or born later than expected, the time of conception may be different. Only if the sexual act took place during the new adjusted period can reasonable cause be established.

**(b) Lack of access.** There can be no reasonable cause established if you can show that you did not have access to the child's mother during the probable time of the child's conception. For example, you were in the Navy at sea during the time the child was conceived.

**(c) Impotency, sterility, or vasectomy.** You cannot be considered the child's biological father if you were physically or mentally incapable of performing the sex act. Sterility or a vasectomy may prevent conception even though a sex act did take place. If you raise these defenses, you must show that your impotency or sterility existed during the probable time of the child's conception.

**(d) Other defenses.** This booklet makes no attempt to describe all possible defenses that may apply in a particular case. ***You are advised to consult with an attorney for other possible defenses.***

**Section 15. False Defenses.** The following claims are not defenses to a finding of reasonable cause:

**(a) The mother's sexual activity before and after the time of conception.** The fact that the mother may have engaged in sexual acts with other men before or after the probable time the child was conceived is not relevant and will not be considered. The hearing is limited to the issue of whether ***you*** engaged in sexual acts with the mother during the probable time of conception.

**(b) Other possible fathers.** In some cases the mother may have engaged in sexual acts with more than one man during the probable time the child was conceived. This is not a defense to your case. Administrative paternity actions are limited to a single issue: Did ***you*** engage in a sexual act with the child's mother during the probable time of conception? Consequently, the fact that other men may be involved has little relevance to your case.

**(c) Contraceptive fraud.** Many alleged fathers attempt to assert the defense of contraceptive fraud. They admit having sexual relations with the child's mother during the probable time of conception. They may even admit they are most likely the child's father. However, they deny they are responsible for the child because the mother fraudulently claimed that she was using contraceptive devices and could not become pregnant. As a variation, the mother may have claimed that because of sterility she could not conceive a child. Fraudulent conduct by the mother, even if true, does not constitute a defense to a paternity action<sup>2</sup>. Also, it is well recognized, and the alleged father should know, that contraceptive devices are not always effective in preventing pregnancy.

**(d) Underage fathers.** Underage fathers are responsible for the children that result from their sexual acts with adult women<sup>3</sup>. If voluntary sexual acts result in a child, an underage father is nonetheless responsible for the child, even though the sexual act could be considered sexual assault or statutory rape under Montana law.

**(e) Relinquishment of parental rights.** Before paternity is established, some men who think they could be the child's father will attempt to relinquish, give up, terminate or "quit claim" their parental rights. These men will then attempt to dismiss CSED's paternity case on grounds that their relinquishments rendered the proceedings inconsequential.

While it is generally true that CSED will not attempt to establish paternity when parental rights have been relinquished, merely signing a form called a relinquishment of parental rights will not accomplish this purpose. To be effective, a voluntary relinquishment of parental rights can only be made in contemplation of

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<sup>2</sup>See Annot., "Misrepresentation Regarding Sterility or Use of Birth Control," 31 A.L.R. 4th 389 (1984)

<sup>3</sup>See e.g., Weinberg vs. Omar E., 106 A.D.2d 540 (N.Y.APP.Div. 1984)

the child's adoption, where the adoption agency or adoptive parents have agreed to accept custody of the child pending the adoption.

District courts may order termination of parental rights in adoption and neglect or abuse proceedings.

## **ADMINISTRATIVE HEARINGS**

**Section 16. Administrative Hearings In General.** An administrative hearing is a less formal version of an ordinary court trial proceeding. Both have similar rights and procedures. Like a court trial, you may examine the evidence and question those who testify against you. You may present your own evidence and you may testify and argue on your own behalf. A final hearing judgment, decision or order issued by an ALJ will be just as binding on you as an order issued by a district court judge.

**Section 17. The Administrative Law Judge.** The ALJ is an impartial and independent decision maker. It is the ALJ's duty to see that the hearing is orderly, a full record is created and the law is followed. To accomplish these duties, the ALJ can administer oaths, rule on the admissibility of evidence, question witnesses, hear objections and the arguments of the parties, judge the credibility of witnesses, weigh the evidence, and interpret the law and regulations pertinent to the case.

**Section 18. How to Disqualify an ALJ.** If you believe the ALJ assigned to hear your case is personally biased, or lacks independence, or should otherwise be disqualified, you may request disqualification. The request must be in writing and must state the facts and reasons for your belief. Your request must be sworn to in front of a Notary Public. The request must be filed with the Office of the Administrative Law Judge **not less than 10 days before the hearing**. If your request is timely filed, another ALJ will consider it. If necessary, the other ALJ may contact you and the CSED caseworker to consider your oral arguments before deciding whether to disqualify the original ALJ.

**Section 19. Parties to the Hearing.** In paternity cases, the parties are limited to CSED on one side and you, the alleged father, on the other. The child and the child's mother take part only as witnesses, not as parties.

**Section 20. Telephone Hearings and In-Person Hearings.** All CSED administrative hearings are initially conducted by telephone conference call. This means that all persons attending the hearing, including the ALJ, are linked by telephone. You will be able to hear everything being said by others and others will be able to hear what you say. You and other participants at the hearing will be able to talk with each other as permitted. Written and documentary evidence will be exchanged sufficiently prior to the hearing so that you will be able to look at and refer to it during the telephone hearing. The only difference between a telephone hearing and an in-person hearing is that the participants will not be able to see each other.

At the end of the telephone hearing, if you feel the telephone affected your opportunity to present your case, you may request an in-person hearing. If granted,

the in-person hearing will be conducted as if the telephone hearing had not taken place.

## ***PREPARING FOR THE HEARING***

***Section 21. Assembling Your Evidence.*** To prepare for the hearing, carefully review all the notices and other materials sent to you by CSED. Next, consider what CSED intends to prove, i.e., that there is reasonable cause to believe you could be the child's biological father (see section 17). Consider also the defenses that are described in this booklet (see section 14). This process should suggest to you what you will need to prove or disprove during the hearing. If you are still in doubt as to how to proceed, ***you may want to seek the advice or assistance of an attorney.***

Your next step is to assemble whatever evidence you will need to prove your case or to disprove CSED's case. Evidence can be in the form of exhibits (documents and other written materials), your direct testimony, or the testimony of witnesses.

***Section 22. Evidence Must be Relevant.*** In assembling your evidence, keep in mind that only "relevant" evidence will be considered by the ALJ. Evidence is relevant if it tends to prove or disprove any pertinent fact or issue. For example, the mother claims that you and she engaged in a sexual act during the probable time the child was conceived. Any evidence that will disprove or contradict her testimony will be relevant. Also relevant would be any evidence offered to prove a defense to the paternity charge, for example, evidence that shows that because of sterility you could not have fathered the child.

Evidence that does not tend to prove or disprove a pertinent fact or issue is not relevant. For example, evidence offered to show the mother's sexual activity before and after the child's time of conception is not pertinent to the issue of whether you could be the child's father.

***Section 23. Evidence Cannot be Hearsay.*** As a general rule, the ALJ will not consider "hearsay" evidence. Hearsay is an oral or written statement made by another person and is not based on your personal knowledge. For example, your friend Bob tells you that the child's mother told him that she did not have sexual relations with you during the time the child was conceived. You cannot testify as to what Bob told you about the child's mother. You can only give testimony from your own knowledge and not about something somebody else told you. (In this example the mother's statement to Bob is inconsistent with her claim that you are the father; however, you will need Bob to testify to it.)

***Section 24. Subpoena Power.*** Witnesses do not always show up for hearings voluntarily. Therefore, ***to be sure your witness is there to testify, request a subpoena.*** A subpoena is an order signed by an ALJ ordering the witness to appear for the hearing.

A subpoena can also order a person to produce any document or other written material which you may need as an exhibit for the hearing. This subpoena is directed to the person who is in possession of the document.

If you need a subpoena, contact the OALJ and ask for a subpoena request form. Complete this form fully. Be sure to include the reasons why you need the subpoena. An ALJ will issue the subpoena if your request form shows a good reason. If the subpoena is issued, it will be your responsibility to have it served on the witness. You will also be responsible for the costs of service and you may be required to prepay witness fees and mileage.

**Section 25. Discovery.** You have a right to see any evidence or information in the possession of CSED that may be necessary for you to prepare your case. This includes information possessed by any witness whom CSED will use at the hearing. The process of asking for and receiving this information is called “discovery.”

Generally, you will not need to request discovery. CSED, as part of its case preparation, will normally share with you any pertinent information it may have. Caseworkers will freely discuss any proposed oral testimony with you. However, if you believe CSED has other information which you can use, you may request it.

To request discovery, you must file a written request with the OALJ as provided in the Notice and Order for Hearing (see section 7). An ALJ will conduct an informal telephone conference with the parties to discuss the form and nature of discovery and the time for completing it. If discovery is granted, the ALJ will issue a discovery order specifying the matters which may be discovered, and the applicable time tables for completion. You are responsible for sending your discovery to CSED or witnesses and for any costs incurred with discovery.

The ALJ will generally deny any request to discover information which is outside the scope of the hearing, or which is protected confidential material. The ALJ will also deny any request which is harassing in nature or which asks for materials available to you through other sources.

**Section 26. “Witness and Exhibit List” with Exhibits.** Within the time provided in the Notice and Order for Hearing (see section 7), you must submit a “Witness and Exhibit List” to the OALJ. This list must include:

- names, addresses, and telephone numbers of any witnesses you intend to call for the hearing. You must include yourself as a witness if you will be offering any testimony at the hearing.
- a listing of the exhibits you propose to introduce at the hearing. Each exhibit should be individually numbered for identification purposes.

With your Witness and Exhibit List you must include the actual exhibits you want the ALJ to consider. If you cannot send the original exhibits, you may send clear and correct photocopies. ***If you fail to send an exhibit, you may not be allowed to talk about it during the hearing.*** The ALJ is not required to admit late exhibits into the record.

Likewise, ***if you fail to name a witness, including yourself, on your Witness and Exhibit List, the ALJ may not allow that witness to testify.***

If you cannot submit an exhibit or name a witness until the hearing, or just before the hearing, send the exhibit or name as soon as possible. Be prepared to explain why you were late. If you have a good reason, the ALJ can admit the exhibit or

allow the witness to testify after all other parties have had a chance to review and respond to the late exhibit or witness.

The Witness and Exhibit List and the exhibits can be mailed or faxed to the OALJ. If you send anything by fax, be sure to mail in the originals to the OALJ.

Copies of the Witness and Exhibit List and copies of your exhibits must be handed or sent by you to all persons, including attorneys and CSED caseworkers, who will be participating at the hearing. If a witness is to testify about an exhibit, make sure the witness has a copy of the exhibit.

CSED caseworkers are located in offices separate and often many miles distant from the OALJ. Therefore, one set of copies must be sent to the OALJ and another set sent to the caseworker. Sending copies to the OALJ does not meet the requirement for sending copies to the caseworker. Conversely, copies sent to the caseworker will not excuse the need to send copies to the OALJ.

If you hand deliver your list and exhibits, ***be sure to have the person who receives them sign a receipt.*** If you mail them, ***include a “certificate of mailing” with the list.*** This certificate shows the date of mailing and includes the names and addresses of all persons to whom you mailed the list and exhibits.

## **AT THE HEARING**

***Section 27. Opening the Hearing.*** Administrative hearings are conducted by telephone conference call. The ALJ will call each party and any witnesses and attorneys at the scheduled time for the hearing. The call will be placed to the telephone numbers provided by you with your Witness and Exhibit List. ***If any of those numbers have changed since you sent in the list, immediately let the ALJ know the new numbers.*** If the ALJ is unable to contact you or your witness, the ALJ may conduct the hearing without you or the witness. ***If it is just you who is not available for the hearing, the ALJ may enter a default order declaring you to be the child’s father.***

After the ALJ connects the hearing participants, the ALJ will administer the oath to each person who will be giving testimony. The oath is a swearing or affirmation by you and the other witnesses that the testimony given by each of you will be true to the best of your knowledge.

***Section 28. Status Conference.*** Prior to the day of the hearing a CSED caseworker will attempt to contact you. The purpose is to gather information for a status conference.

After the hearing is opened and immediately before the hearing, the ALJ will hold a status conference on the record. The purpose of the conference is to limit the hearing to just those issues which are in contention. Specifically, the status conference will:

- identify those facts which the parties agree to be true and which will require no proof during the hearing;



- identify those hearing exhibits which the parties agree may be entered without objection; and
- identify those issues of fact or law that remain to be determined by the ALJ during the hearing.

**Section 29. Hearing Presentations.** Neither party will need to offer evidence or testimony with regard to those uncontested facts and exhibits identified at the status conference. The ALJ will limit the hearing to a determination of those issues of law or fact that are contested.

Ordinarily, CSED will have the first opportunity to present its testimony and exhibits. However, in some cases, the ALJ may require the alleged father to proceed first. For example, the status conference may show that the parties all agree on the initial facts of the case. That is, they all agree that the alleged father did have sexual contact with the child's mother during the probable time of the child's conception. The only contested issue is whether the alleged father was sterile at the time. In this example, the ALJ would likely require the alleged father to present his defense first.

As noted, in a regular case CSED will present its testimony and exhibits first. The caseworker will testify as a witness, and will introduce exhibits and testimony of other witnesses. When the caseworker finishes, you can question (cross examine) the caseworker or another witness about anything he or she said. You can also ask questions about any exhibits introduced by CSED. This is also the time for you to object to CSED exhibits or testimony. Objections may be based, for example, on the grounds that a particular exhibit or statement is hearsay or is not relevant (see sections 22 and 23).

At the close of CSED's testimony, it will be your turn to present testimony, witnesses, and exhibits to refute CSED's case or to prove any defenses you have (see section 14). The CSED caseworker may then cross examine you and your witnesses and raise any objections to your evidence.

At the close of your case, CSED will have a second opportunity to present additional exhibits and testimony of witnesses. CSED will offer this additional evidence to rebut any defense you may have raised. You may also cross examine CSED on this evidence or make objection to any part of it.

**Section 30. Oral Arguments and Written Briefs.** Upon request of a party, before closing the hearing the ALJ will allow all parties to make oral arguments. Oral arguments will give the parties another opportunity to fully clarify their positions and claims for the ALJ's consideration.

If there are conflicting views as to how the law relates to the facts, the ALJ may order the parties to submit written briefs. Typically, the ALJ will set a briefing schedule that allows the contentious party to submit the first brief that may then be answered by the other party. The final hearing decision will be delayed until the ALJ is able to consider the briefs.

**Section 31. Closing the Hearing.** After each party has presented evidence and made arguments, the ALJ will close the hearing record. ***After the record is***

***closed, you will not be permitted to submit additional evidence or other materials for consideration without the ALJ's express permission.*** The ALJ will decide your case solely on the evidence and other relevant information in the record. Therefore, it is important that you are fully prepared to present your entire case at the time of the hearing. ***Do not hold back anything that may be relevant to the final decision.***

Generally, the ALJ will enter a final hearing decision and order within 60 days after the hearing is closed and all late evidence and briefs have been received. ***The final decision and order is subject to judicial review by a district court*** (see section 38). A copy of the final decision and order will be mailed to you and, if you have an attorney, to your attorney.

***Section 32. The Hearing Record.*** The hearing record is the official account of the entire hearing process. The hearing record includes the testimony, exhibits, briefs, oral arguments, applicable law, and any late exhibits or briefs permitted after the hearing. To preserve testimony and oral arguments for the record, the ALJ will tape record the hearing. The tape will be part of the record.

***Section 33. The Hearing Decision and Order.*** After considering the entire hearing record, the ALJ will issue a proposed hearing decision and order. You will have 20 days after you receive the proposed decision and order to file a motion for review with the OALJ. If neither party timely files a motion for review, the proposed decision and order will become final. The decision will not address whether or not you are the child's father. Rather, the decision will determine whether there is reasonable cause to believe you could be the child's father (see section 11). If the ALJ finds that reasonable cause exists, the ALJ will order you to submit to genetic testing (see section 34). If the ALJ does not find reasonable cause, the ALJ will dismiss your case.

***Section 34. Genetic Testing Subpoena.*** If you are ordered to submit to genetic testing, the CSED caseworker will make arrangements for the taking of tissue samples. The caseworker will then mail a "Genetic Testing Subpoena" to you. This form will give you the time and place for the genetic testing. ***You must appear in person at that time and place and you must submit to taking of tissue samples. If you fail to do so, CSED may enter a default order declaring you to be the child's father. In addition, if you fail to abide by the Genetic Testing Subpoena, you can be fined up to \$500.***

If you have good reason why you cannot be at the place or the time set for testing, promptly contact your CSED caseworker. The caseworker will try to arrange another mutually acceptable time for the genetic testing.

If you do submit to genetic testing and if you disagree with test results showing you to be the biological father, you may request that the matter be submitted to a district court for final determination (see section 38).

## ***AFTER THE FINAL DECISION AND ORDER IS ENTERED***

**Section 35. Correction of Clerical Errors.** If you discover a clerical error in the final decision and order, and if correction of that error is important to you, you may submit a “Motion to Correct Clerical Error.” Clerical errors may include, but are not limited to:

- typographical errors
- numbers or words transposed
- errors in names or spelling of names.

Mail your motion to the OALJ. Mail a copy of the motion to the CSED caseworker. When your motion is received, the ALJ will consider it. If necessary, the ALJ may allow the caseworker to respond. If your motion is granted, the ALJ will issue an order correcting the error.

**Section 36. Reconsideration.** After the final decision and order is issued, you will have one limited opportunity to have your case reconsidered by the ALJ. Reconsideration is given only if:

- you discover additional evidence after the hearing is closed and that evidence was not reasonably available to you at the time of the hearing; or
- you believe the ALJ overlooked an important fact that was presented at the hearing; or
- you believe the ALJ considered some fact that was not presented at the hearing.

To request reconsideration, submit a written “Motion for Reconsideration” to the OALJ. Your motion should clearly state the basis or reasons for your request. It may be accompanied by an affidavit or proposed exhibit supporting your position. The motion must be filed with the OALJ ***within 10 days*** after the day you received the hearing decision and order. Motions for Reconsideration filed after this time will be denied.

When the OALJ timely receives a Motion for Reconsideration, the ALJ will review the request. Before deciding the matter, the ALJ will give all other parties an opportunity to file written responses. If necessary, the ALJ may set the matter for oral arguments of the parties. If the motion is granted, the ALJ may either amend the original decision and order, issue a new decision and order or order a new hearing on the merits.

**Section 37. Setting Aside Default Orders.** There are four ways in which you can be declared the child’s father by default:

- You fail to respond to the Notice of Parental Responsibility (section 3).
- You respond to the Notice of Parental Responsibility, but not within the time allowed by law (section 5).
- You fail to be available at the time and place set for the administrative hearing (section 9).
- You fail to appear at the time and place set for genetic testing, or you fail to allow a sample of your tissue to be taken (section 34).

If CSED entered a default order against you, under some circumstances you may have the default set aside. The most common reasons for setting aside defaults are:

- ***Mistake.*** A mistake is some unintentional act, omission, or error arising from ignorance, surprise, imposition or misplaced confidence.
- ***Inadvertence.*** Inadvertence is lack of attention, want of care, failure to pay careful and prudent attention to proceedings by which rights may be affected.
- ***Excusable Neglect.*** Excusable neglect is the failure to take proper steps at the proper time because of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of the person's attorney or the promises of an adverse party.

If you have a good reason why the default order should be set aside, you may submit a "Motion for Relief" to the Office of the Administrative Law Judge. Your motion must be in writing and must clearly state your reasons for the motion. The motion must be filed with the Office of the Administrative Law Judge ***no later than 63 days*** from the day the default decision was mailed to you.

When the Office of the Administrative Law Judge receives your motion, the other parties will be granted an opportunity to object. If there is no objection, the ALJ will set aside the default order and set your case for hearing on the merits. If an objection is made, the ALJ may order oral arguments by the parties before making a decision on the motion.

***Section 38. Judicial Review.*** If you believe the hearing decision and order has wrongfully or erroneously affected your rights, you may appeal the decision to a district court. This appeal process is known as a "petition for judicial review."

Generally, when a petition for judicial review is filed with a district court, CSED will provide the court with copies of the entire administrative hearing record. The court will review that record to see if CSED correctly applied the law to the facts. The court will also look to see if there is sufficient evidence to support the decision. The court will not substitute its judgment for that of the ALJ as to the importance and value of the evidence. The court may affirm the ALJ's decision or the court may remand the case to the ALJ for further proceedings. The court may also reverse the decision if your rights have been violated.

The process of judicial review is confined to the administrative record and ***does not create a new hearing right.*** Any matter that you did not raise during the administrative hearing will not be considered by the court. ***This is just another reason why you must present all your evidence during the administrative hearing.***

Before a district court will consider a petition for judicial review, there are numerous procedural steps that you must follow. The most important of these steps is the requirement to file the petition ***within 33 days*** from the day the administrative decision was mailed to you. ***If you fail to do this, the court will dismiss your petition without considering it.***

After the petition is filed, you must properly serve CSED with a copy of the petition ***within 30 days*** from the day you filed the petition. Within this same ***30-day period*** you must also serve a copy of the petition on the Attorney General and upon any other person who may be a party to the administrative hearing. Again, ***if you fail to do this, the court will dismiss your petition.***

If you are interested in judicial review of your administrative decision, CSED has prepared a packet of materials. This packet contains an outline of all the steps that must be followed and the applicable time frames for each step. The packet also contains sample forms for petitions, service of process and other documents related to the judicial review process. To get this packet contact CSED as provided in section 40 and request the judicial review packet.

***(This section and the judicial review packet are for general information only. To help you decide whether you have good reason to seek judicial review, consult with an attorney of your choice. If you do decide to seek judicial review, you are encouraged to seek the services of an attorney.)***

***Section 39. Referral of the Paternity Issue to District Court.*** Under appropriate circumstances, the issue of paternity may be referred to a district court for a non-jury trial.

***To help you understand when referral to a court is appropriate, consult with an attorney of your choice.***

Before the matter can be referred to a court:

- you must submit to genetic testing as discussed in this booklet;
- the test results must show a probability that you are the biological father; and
- within 20 days after CSED serves a copy of the genetic test results on you, you must file a written objection with CSED specifically requesting referral to the district court.

When an appropriate and timely objection is received, the CSED will refer the entire administrative record to the court. The court will determine the matter of paternity based on this record and any new evidence that may be produced at trial. The trial proceedings are limited to just the issue of paternity. The court will not consider other issues such as custody and visitation.

## ***HOW TO CONTACT THE CSED***

***Section 40. Contacting Your Caseworker.*** If you need further information, have questions or wish to settle this matter, or otherwise need to contact your CSED caseworker, you may:

- Write to the address of the regional CSED office shown on the Notice of Parental Responsibility. Address your letter to the caseworker who signed the bottom page of the notice. Be sure to include your name, current address and CSED case number. That number is located at the top of the notice.
- Call CSED at the numbers listed on the front page of this booklet. You will receive instructions for transferring to the regional CSED office shown on the Notice of Parental Responsibility.

***Section 41. Contacting the Office of the Administrative Law Judge.*** If you need to contact the Office of the Administrative Law Judge (OALJ) to request a hearing, to continue or reschedule a hearing, or to discuss similar matters, write or fax the OALJ at the following address or number:

Office of the Administrative Law Judge  
111 North Jackson Street, Suite 2C  
PO Box 202922  
Helena, MT 59620-2922  
Fax: (406) 444-6565